90-1959

No. _____

Supreme Court, U.S.
FILED
JUN 25 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1990 TERM

WINDSOR HOUSE, INC.,

Petitioner,

v.

GRANT THORNTON,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court of Ohio

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Supreme Court of Ohio violate the Petitioner's fourteenth amendment right to equal protection of the laws when it held in *Investors REIT One* v. *Jacobs*, 46 Ohio St. 3d 176 (1989), that the discovery rule, as applied to other tort claims, particularly those sounding in negligence, does not apply to such a claim against an accountant.

2. Did the Supreme Court of Ohio violate the Petitioner's fourteenth amendment right to due process of law when it retroactively applied the *Investors* decision to the Petitioner's claim of negligence against the Respondent, thereby completely destroying the Petitioner's claim for relief, when the Petitioner's claim of negligence was timely filed pursuant to prevailing law.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the Petitioner, Windsor House, Inc., and the Respondent, Grant Thornton, f.k.a. Alexander Grant and Company. Windsor House, Inc., an Ohio corporation, is closely held and is not a publicly traded company. Windsor House, Inc. has no other ownership interests in any other corporation.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. _____

WINDSOR HOUSE, INC.,

Petitioner,

v.

GRANT THORNTON,

Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

The petitioner Windsor House, Inc., respectfully prays that a writ of certiorari issue to review and reverse the judgment and opinion of the Supreme Court of Ohio, announced February 13, 1991.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 57 Ohio St. 3d 158 (1991), and is reprinted in the appendix hereto, p. 2a, *infra*.

The rehearing entry of the Supreme Court of Ohio is reported at 59 Ohio St. 3d 701 (1991), and is reprinted in the appendix hereto, p. 1a, *infra*.

The journal entry and opinion of the Court of Appeals of Ohio, Seventh Appellate District, Mahoning County, Ohio is unreported, and is reprinted in the appendix hereto, p. 10a, *infra*.

The judgment entry of the Common Pleas Court of Mahoning County, Ohio is unreported and reprinted in the appendix hereto, 20a, *infra*.

JURISDICTION

On October 31, 1985, Respondent brought this suit against Petitioner in the Common Pleas Court of Mahoning County, Ohio. Petitioner filed its answer and counterclaim on March 5, 1986. On November 19, 1987, the Trial Court granted Respondent's motion for summary judgment on the grounds that, *inter alia*, Petitioner's claim for professional negligence was not timely filed. See p. 20a, *infra*.

Petitioner appealed to the Ohio Court of Appeals, Seventh Appellate District, Mahoning County, Ohio. That Court reversed the Common Pleas Court's decision on October 16, 1989. See p. 10a, *infra*.

Respondent then appealed to the Supreme Court of Ohio, which, on February 13, 1991, reversed the decision of the Court of Appeals and remanded the case to the Common Pleas Court for further proceedings. See p. 2a, *infra*. Petitioner filed a motion for rehearing, which the Supreme Court of Ohio denied on March 27, 1991.

The jurisdiction of this Court to review the judgment of the Supreme Court of Ohio is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code §2305.09 Four years; certain torts

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

STATEMENT OF THE CASE

Petitioner is an Ohio corporation which is engaged in the business of providing long-term skilled nursing home care. Some of its residents include Medicaid recipients, pursuant to a provider agreement with the State of Ohio, a sample of which is included in the appendix at p. 22a. The State of Ohio participates in the federal Medicaid program.

Respondent is a national accounting partnership which, *inter alia*, performs auditing services.

A main goal of the federal Medicaid reimbursement program is to set a fair reimbursement rate, based upon reasonable costs, to insure there are a sufficient number of long-term health care providers to service the needs of the financially disadvantaged. One of the requirements Petitioner must comply with in order to continue to participate in the program on the state level is to submit to an audit by the State of Ohio, or its designee, of its financial records, as set forth in the above-referenced provider agreement.

The State of Ohio was under a federally imposed deadline to audit all homes providing services to Medicaid recipients. As the State could not meet the deadline with its own staff, it extended an invitation to bid to private auditing firms to perform the audits on behalf of the State. As a result of being awarded a contract by the State of Ohio, Respondent became the State of Ohio's designee.

In October, 1980, Petitioner was subjected to an audit by Respondent at the behest of the State of Ohio. Petitioner contends Respondent negligently performed the audit. Petitioner did not discover said negligence, and did not sustain damage therefrom, until two years later. Petitioner was notified in September, 1982 by the State of Ohio of its determination that Petitioner owed $2.5 million in Medicaid overpayments.

In January, 1986, via a counterclaim, Petitioner asserted, *inter alia*, a claim for professional negligence against Respondent. This claim was filed within four years of the date Peti-

tioner discovered said negligence, and sustained damage therefrom.

At the time this claim was asserted, as well as at the time Petitioner's cause of action for such claim accrued, the law of the State of Ohio provided the statute of limitations for a claim of negligence commences when damages are ultimately sustained and/or the plaintiff first discovers same.

The trial court sustained Respondent's motion for summary judgment as to the negligence claim as barred by the statute of limitations set forth in Ohio Rev. Code Ann. § 2305.09 (Page 1991), using as the trigger date the date Respondent completed the audit, rather than the date Petitioner received the deficiency notice. The trial court also sustained summary judgment as to other claims, which are not at issue here. The Court of Appeals, Seventh Appellate District, Mahoning County, Ohio, reversed, finding that Petitioner was within the statute of limitations.

Subsequent to the Court of Appeals' decision, the Supreme Court of Ohio handed down *Investors REIT One* v. *Jacobs*, 46 Ohio St. 3d 176 (1989), which held the discovery rule as applied to other causes of action sounding in tort, including negligence, could not be applied to accountants. Respondent appealed to the Supreme Court of Ohio. On February 13, 1991, the Supreme Court of Ohio reversed the decision of the Court of Appeals, reinstated the decision of the Court of Common Pleas and remanded the case for further proceedings. The Supreme Court of Ohio held (1) that the decision in *Investors*, which held the discovery rule is not available to a claim of negligence against an accountant stands, and (2) that decision would be applied retroactively to Petitioner's claim, and therefore, was barred by the statute of limitations. Petitioner timely filed a motion for rehearing, and on March 27, 1991, the Supreme Court of Ohio denied same.

Pursuant to the Supreme Court of Ohio's decision on the merits of the case and the motion for rehearing, Petitioner files its Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court of Ohio's failure to apply the discovery rule to a claim of negligence against an accountant violates Petitioner's fourteenth amendment right to equal protection; there is no rational basis for analyzing the accrual of a claim of negligence against an accountant any differently than any other tort claim.

By refusing to judicially extend the discovery rule to victims of accountant negligence as it has for other tort claims, the Supreme Court of Ohio has trampled upon Petitioner's right to equal protection. There exists no rational basis to support the decision to treat this class of litigants differently from the class asserting claims of medical/legal negligence, the class asserting claims of negligence generally, or the class asserting a plethora of other tort claims.

The present statutory scheme in the State of Ohio divides the class of tort litigants into several sub-classes for purposes of the accrual of the cause of action for their particular tort and the triggering of the applicable statute of limitations. Each is governed by one of the following statutes of limitations.

A cause of action for medical/legal negligence ". . . shall be commenced within one year after the cause of action accrued . . ." Ohio Rev. Code Ann. § 2305.11 (Page 1991) (p. 39a, *infra*). As the date upon which such an action accrues was not legislatively defined, the Supreme Court of Ohio judicially determined such a cause of action accrues at the later of: (1) the patient/client discovered or should have discovered the resulting injury, or (2) the termination of the relationship with the physician/attorney. *Zimmie* v. *Calfee, Halter & Griswold*, 43 Ohio St. 3d 54 (1989). A cause of action for bodily injury ". . . shall be brought within two years after the cause thereof arose . . .". Ohio Rev. Code Ann. § 2305.10 (Page 1991) (see p. 38a, *infra*). The accrual of a cause of ac-

tion for bodily injury due to exposure to asbestos, chromium and its chemical forms, chemical defoliants/herbicides and causative agents including agent orange, and DES and other non-steroidal synthetic estrogens were defined by the legislature within the statute itself, adopting the discovery rule. Again, as it was not defined within the statute, the discovery rule was judicially extended to the accrual of a claim for general bodily injury. *O'Stricker* v. *Jim Walter Corp.*, 4 Ohio St. 3d 84 (1983).

Ohio Rev. Code Ann. § 2305.09 (Page 1991), which is at issue here, provides that, *inter alia*, a cause of action for negligence ". . . shall be brought within four years after the cause thereof accrued . . .". *Id.* The statute defines the accrual of a cause of action for fraud and trespass underground by applying the discovery rule. The remaining torts covered thereby have been left to judicial interpretation. The accrual of a cause of action sounding in negligence generally has been judicially interpreted to be when the injury is discovered or actually ensues, when the negligent conduct and damages therefrom are not contemporaneous. *Kunz* v. *Buckeye Union Ins. Co.*, 1 Ohio St. 3d 79 (1982); *Velotta* v. *Leo Petronzio Landscaping, Inc.*, 69 Ohio St. 2d 376 (1982); *State ex rel. Local Union 377* v. *Youngstown*, 50 Ohio St. 2d 200 (1977).

This was the state of the law in Ohio at the time Petitioner asserted its claim of negligence against Respondent. Subsequent to the Court of Appeals reinstating Petitioner's claims for negligence against Respondent, relying on *Local 377, supra*, and its progeny, the Supreme Court of Ohio announced its decision in *Investors REIT One* v. *Jacobs*, 46 Ohio St. 3d 1976 (1989). See p. 40a, *infra*. Uncharacteristically and contrary to the well-established case law set forth above, the Supreme Court of Ohio refused to apply the discovery rule to a claim of negligence against an accountant, holding the statute runs from the date of the negligent conduct, even if damages therefrom are not contemporaneous. This decision was announced nine years after the conduct

the conduct which Petitioner asserts Respondent was negligent. The Supreme Court of Ohio then retroactively applied the *Investors* decision, *supra*, to Petitioner's claim eleven years after the fact.

Petitioner contends the Supreme Court of Ohio has violated its right to equal protection. As a member of the class of litigants with claims for negligence against accountants, it has been treated differently from other classes of litigants with other tort claims. Discussing the applicaton of the equal protection clause of the fourteenth amendment in *Eisenstadt* v. *Baird*, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972), this Court held:

> "The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' [Cite omitted]." *Id.* at 447.

The question before this Court is whether there is some rational basis for the Supreme Court of Ohio's refusal to extend the discovery rule to litigants with a tort claim of negligence against accountants, as it has to litigants asserting a multitude of other tort claims. Petitioner contends there is not. Contrary to the proscription in *Eisenstadt*, *supra*, the *Investors* decision, *supra*, results in treating similarly situated persons differently.

In *Investors*, *supra*, the Supreme Court of Ohio acknowledged it applied the discovery rule to medical/legal claims pursuant to O.R.C. § 2305.11 absent legislative definition of the accrual of those claims. It also noted it engaged in similar judicial interpretation when it extended the discovery

rule to general claims of bodily injury beyond those specifically delineated in O.R.C. § 2305.10. These two classes of litigants were afforded the protection of the discovery rule, which tolled the accrual of the statute of limitations for their particular tort claim when the injury was not contemporaneous with the negligent conduct, but manifested itself at some later date.

The Supreme Court of Ohio in the *Investors* decision went on to state that O.R.C. § 2305.09 expressly provided a discovery rule for a cause of action for trespassing underground or for fraud only. As the legislature failed to expressly extend such a rule to a claim for general negligence, it declined to do so. Accordingly, it held litigants with tort claims sounding in negligence against an accountant must file their action within four years of the negligent conduct, irrespective of the fact that the injury was not discoverable within that four-year period. This decision has resulted in depriving this class of litigants, of which Petitioner is a member, equal protection of the laws.

The Supreme Court of Ohio has chosen to treat this class of tort litigant differently, reasoning:

> "While expressly providing a discovery rule for certain actions arising under R.C. 2305.09, no such rule was extended to general negligence claims. The General Assembly's failure to include general negligence claims under the discovery rule set out in R.C. 2305.09 argues strongly that it was not the legislature's intent to apply the discovery rule to such claims." *Investors*, 46 Ohio St. 3d at p. 181. See p. 49a, *infra*.

On the contrary, the Supreme Court of Ohio has extended the discovery rule to general negligence claims governed by O.R.C. § 2305.09. In its decisions in both *Kunz*, *supra* and *Local 377*, *supra*, which interpreted O.R.C. § 2305.09, the court applied a discovery rule (in *Kunz*, *supra*, a delayed damage theory) to the plaintiff's negligence claim, and accordingly found them to be timely filed. This arbitrary

distinction creates two classes of negligence litigants subject to the statute of limitations set forth in O.R.C. § 2305.09: those asserting general negligence claims and those asserting negligence claims against accountants. In neither case did the General Assembly define the accrual date for the statute of limitations. In the case of the former class, the Supreme Court of Ohio adopted the discovery rule. Under peril of violating the due process clause of the fourteenth amendment, the discovery rule must likewise be extended to the latter class, of which Petitioner is a member.

The rationale of the Supreme Court of Ohio clearly does not pass constitutional muster. This is an unreasonable and arbitrary classification among tort litigants, especially between those governed by the same statute. It has no relation whatsoever to the object of the statute, namely, encouraging the timely filing of negligence actions against accountants.

One of the most common fact patterns found in the authorities cited by Justice Sweeney in his dissent in *Investors* involved negligently prepared income tax returns. In those cases, the plaintiffs received the deficiency notice from the IRS after the statute had run, had the date the return was prepared had been used as the trigger date. In all cases, however, the plaintiff instituted the lawsuit shortly after receiving the IRS deficiency. Obviously, a party cannot file a claim they do not know exists. In those cases, as in cases involving claims against physicians and attorneys, the overwhelming experience in applying the discovery rule to a litigant's claim supports the main goal of a statute of limitations, the prevention of litigating stale claims.

An old and venerated tenet of jurisprudence in this country is that litigants have equal access to the courts of this country. This Court has recognized the . . . "utter exclusiveness of court access and court remedy . . .". *United States* v. *Kras*, 409 U.S. 434, 445, 34 L. Ed. 2d 626, 93 S. Ct. 631 (1973). Arbitrarily denying this class of litigants access to the courts is violative of the equal protection clause.

II. The Supreme Court of Ohio's retroactive application of its holding in *Investors REIT One* v. *Jacobs* to Petitioner's claim violates due process as guaranteed by the fourteenth amendment, as it completely destroys Petitioner's accrued substantive right to sue.

The Supreme Court of Ohio's decision in *Investors*, *supra*, violates the right to equal protection guaranteed litigants with a claim of negligence against an accountant. This class is denied the benefit of the discovery rule which has been extended to other tort litigants in the State of Ohio. Petitioner is a member of this class. Prior to the *Investors* decision, Petitioner successfully availed itself of the discovery rule in order to bring its negligence claim against Respondent. Retroactive application of the *Investors* decision, *supra*, to Petitioner's claim violates its right to due process.

This Court set forth the analysis in determining the retroactivity of a judicial decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971):

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed, . . . Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' . . . Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' . . ." *Id.*, 404 U.S. at 106-107. [Internal citations omitted].

In *Chevron Oil, supra*, the plaintiff instituted a personal injury action pursuant to admiralty law. While the case was pending, this Court announced a decision wherein such actions were governed by state law rather than admiralty law. When the Louisiana one-year statute of limitations was applied to the plaintiff's claim, it resulted in his claim being time barred. This Court held such a result would be anomalous, as:

> ". . . retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable . . . It would also produce the most 'substantial inequitable results,' . . . to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation that the law imposed on him . . . nonretroactive application here simply preserves his right to a day in court." *Chevron Oil*, 404 U.S. at 108.

Petitioner's situation is on all fours with the fact pattern in *Chevron Oil, supra*. Likewise, retroactive application must be barred.

First, the *Investors* decision, *supra*, established a new principle of law which overruled clear past precedent, as well as being an issue of first impression. At the time Petitioner filed its claim, the Supreme Court of Ohio had not addressed the issue as to when a cause of action of negligence against an accountant accrued. Relying upon analogous claims, namely, claims of negligence in general, Petitioner availed itself of the discovery rule, which had been the law in Ohio at least as far back as 1977 pursuant to *Local Union 377, supra*, and its progeny. As this Court noted in *Chevron Oil, supra*, all Petitioner could do was

> ". . . to rely on the law as it then was. 'We should not indulge in the fiction that the law now announced has

> always been the law, and, therefore, that those who did not avail themselves of it waived their rights.' " *Id.* at 107, quoting *Griffin* v. *Illinois*, 351 U.S. 12, 26, 100 L. Ed. 891, 76 S. Ct. 585 (1956).

Secondly, in analyzing the purpose and effect of O.R.C. § 2305.09, the decision in *Investors*, *supra*, let alone retroactive application in Petitioner's case would, in fact, retard its operation. The purpose of a statute of limitations is to avoid the prosecution of stale claims. By holding a cause of action for negligence against an accountant accrues on the date of the negligent conduct, a litigant's right to sue oftentime expires before they were even aware a cause of action existed. Case in point is the receipt of a deficiency notice from the IRS after the statute of limitations has run. Imposing such a burden would result in more cases involving accountants and their clients than less, and infuse in the professional relationship a great deal of mistrust. The operation of O.R.C. § 2305.09 has suffered no ill effects by affording general negligence litigants protection of the discovery rule. Adopting the discovery rule has not caused any problems in affording the same protection to other tort litigants whose causes of action are governed by O.R.C. § 2305.10 and O.R.C. § 2305.11.

Finally, retroactive application of the *Investors* decision, *supra*, would result in substantial injustice. It would completely cut off Petitioner's opportunity to present its claim of negligence against Respondent and have the issues fully adjudicated on their merits. Accordingly, *Chevron Oil* dictates the nonretroactive application of the *Investors* decision, *supra*, to Petitioner's claim. Otherwise, Petitioner would be denied its right to due process.

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication

> be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L. Ed. 2d 865, 70 S. Ct. 652 (1950).

Petitioner's due process claim must undergo a two-part analysis: Was Petitioner deprived of a protected right, and if so, what process was due.

Petitioner has been deprived of the right to have its claim of negligence heard upon the merits. This Court noted in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982), it was ". . . affirmatively settled by the *Mullane* case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Id.* at 428. This Court went on to say:

> "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances . . . the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].' " *Logan*, 455 U.S. 422 at 429-430, quoting *Boddie* v. *Connecticut*, 401 U.S. 371, 380, 28 L. Ed. 2d 1113, 91 S. Ct. 780 (1971).

By retroactively applying the *Investors* decision, *supra*, to Petitioner, the Supreme Court of Ohio has denied Petitioner the right to be heard on its claim. Eleven years after the negligent conduct and seven years after the statute of limitations has expired, Petitioner's claim is wiped out before ever being heard on the merits as a result of new case law. This

result is clearly prohibited by the Due Process Clause. Petitioner had filed its claim of negligence within the statute of limitations as Ohio law then provided. Had the retroactive application of the *Investors* decision, *supra*, left Petitioner a reasonable time within which to re-file its claim for negligence, such retroactive shortening of the statute of limitations would have been constitutional. *Turner* v. *New York*, 168 U.S. 90 (1897), *infra*. However, in this case, the time was completely destroyed.

This Court acknowledged the States' monopoly on dispute resolution. *Boddie*, 401 U.S. at 375. Accordingly,

> ". . . absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie*, 401 U.S. at 377.

In determining what process is due Petitioner, the question becomes whether there exists an overriding state interest, including ". . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

The process that is due Petitioner is the extension of the discovery rule to its claim of negligence. Adopting this procedural safeguard would pose neither a fiscal nor an administrative burden to the state. There is no overriding significant state interest which would preclude this extension. It is not creating a new cause of action, which could theoretically burden the courts, although that is likewise not a consideration. It merely puts litigants with negligence claims against an accountant on equal footing with those who have similar claims against physicians, attorneys, and a multitude of other negligence and tort claims.

As this Court long ago held in *Turner* v. *New York*:

> "It is well settled that a statute shortening the period of limitations is within the constitutional power of the legislature, provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect." *Id.* at p. 94.

Petitioner asserts that the *Investors* decision, *supra*, violates its consitutional right to equal protection. It unreasonably and arbitrarily differentiates between similarly situtated litigants. Further, the retroactive application of *Investors*, *supra*, is contrary to the spirit of this Court's decision in *Turner*, *supra*. Applying *Investors*, *supra*, to Petitioner's claim, eleven years after the fact, flies in the face of this principle. Prospective application of *Investors*, *supra*, generally, and, most importantly, retroactively to Petitioner, not only violates equal protection, but due process as well.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

THE SUPREME COURT OF OHIO
1991 TERM
To wit: March 27, 1991

Case No. 89-2127

Grant Thornton, f/k/a Alexander Grant & Company,
Appellant,

v.

Windsor House, Inc.,
Appellee.

REHEARING ENTRY
(Mahoning County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 87CA187)

/s/ THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO
1991 TERM
To wit: February 13, 1991

Case No. 89-2127

Grant Thornton, f/k/a Alexander Grant & Company,
Appellant,

v.

Windsor House, Inc.,
Appellee.

JUDGMENT ENTRY

APPEAL FROM THE
COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Mahoning County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed and summary judgment in favor of Grant is reinstated consistent with the opinion rendered herein.

It is further ordered that the appellant recover from the appellee its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Mahoning County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

(Court of Appeals No. 87CA187)

/s/ THOMAS J. MOYER
Chief Justice

GRANT THORNTON, F.K.A. ALEXANDER GRANT & COMPANY,
Appellant,

v.

WINDSOR HOUSE, INC.,
Appellee.

[Cite as Grant Thornton *v.* Windsor House, Inc. (1991), 57 Ohio St. 3d 158.]

Contracts—Care provider subject to audit under the Medicaid program is not an intended third-party beneficiary of the audit contract between the Ohio Department of Public Welfare and the auditor.

A care provider subject to an audit of reimbursable costs under the Medicaid program is not an intended third-party beneficiary of the audit contract between the Ohio Department of Public Welfare and the auditor.

(No. 89-2127—Submitted December 11, 1990—Decided February 13, 1991.)

APPEAL from the Court of Appeals for Mahoning County, No. 87 C.A. 187.

The federal Medicaid program, Title XIX of the Social Security Act of 1965, provides reimbursement to care providers for reasonable operating costs. Medicaid makes these payments through approved state plans. At the times relevant to this appeal, the Ohio Department of Public Welfare ("ODPW") (now the Ohio Department of Human Services) administered the Medicaid care provider reimbursement plan in Ohio. On the federal side, the Health Care Financing Administration ("HCFA") distributed the Medicaid funds to the states. The HCFA required that state plans provide for periodic audits of participating care providers to assess the reasonableness of the costs for which care providers seek reimbursement. Former Section 450.30, Title 42, C.F.R. (1977), recodified at former Sections 447.290-447.296, Title 42, C.F.R. (see 43 Fed. Reg. 45259 *et seq.* [1978]). Today's dispute arises from one such audit.

During April 1980, Ohio accepted bids from private auditors to perform audits of care providers by the end of that year. The state contract required a complete audit for 1975 and a limited audit for the period July 1972 through December 1978. The audits were designed to discover overpayments made to care providers. Former Section 447.294, Title 42, C.F.R.

On May 14, 1980, the state accepted the bid of Alexander Grant & Co., now known as Grant Thornton ("Grant"), and assigned Grant to audit six nursing homes operated by Windsor House, Inc. ("Windsor"). Grant's audit of Windsor was completed in November 1980 and concluded that Windsor's records were insufficient upon which to certify an opinion as to the reasonableness of Windsor's reimbursed costs. Grant related this conclusion to Windsor during an exit interview on November 21, 1980. Grant then issued its report to the ODPW on November 24, 1980, expressing the same conclusion.[1]

According to Windsor, in September 1982 the ODPW notified Windsor that it had received $2.5 million in overpayments and ordered Windsor to repay that amount to the state. Planning an appeal, Windsor hired Grant in November 1982 to explain the deficiencies in Windsor's records, to extend its review procedures to Windsor's records, and to assist Windsor during the appeal process. Windsor subsequently hired Grant during 1983 and 1984 for services unrelated to the ODPW repayment order.

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[1] Grant's report to ODPW read in relevant part:

"The accounting records of the Provider were not in an adequate condition to support the costs claimed for reimbursement in the Cost Reports filed for the six-month periods ended June 30, 1975 and December 31, 1975. Nor was it practicable to extend our auditing procedures in order to satisfy ourselves that such costs were allowable (necessary and reasonable for patient care).

"Because of the significance of the matter discussed in the preceding paragraph, the scope of our work was not sufficient to enable us to express, and we do not express, an opinion on the accompanying Schedule of Reimbursable Costs for the six-month periods ended June 30, 1975 and December 31, 1975."

On October 31, 1985, Grant filed suit against Windsor in the Court of Common Pleas of Mahoning County, asserting that Windsor had breached the contracts between Grant and Windsor made in 1982, 1983, and 1984. In its answer to Grant's complaint, filed on January 30, 1986, Windsor asserted eight counterclaims. Grant subsequently moved for summary judgment on the first five of Windsor's counterclaims, each arising from Grant's original audit of Windsor performed for the ODPW. These five claims, respectively, sound in negligence, contract, malpractice, fraud, and libel.

The common pleas court ruled in favor of Grant's motion, dismissing each of the five claims. The court dismissed the negligence, malpractice, and fraud claims on the ground that they were not brought within the four-year statute of limitations contained in R.C. 2305.09. The court dismissed the second claim, alleging breach of contract, because the court found that Windsor was not an intended beneficiary of the contract between Grant and the ODPW. Lastly, the court dismissed the libel claim because it found that the communication upon which the claim was based was not defamatory.

Windsor appealed the dismissal of the first four claims to the Court of Appeals for Mahoning County. The appeals court reversed the grant of summary judgment on all four counts, ruling that the negligence, malpractice, and fraud claims did not accrue until Windsor sustained damage — when the ODPW ordered repayment — and hence were brought within the four-year statute of limitations. The appeals court also ruled that there was conflicting evidence concerning whether Windsor was an intended third-party beneficiary of Grant's contract with the ODPW and, hence, that summary judgment was inappropriate.

Grant now appeals the decision of the court of appeals to this court as to Windsor's negligence, malpractice, and contract claims. The cause comes before this court upon the allowance of a motion to certify the record.

Roberts & Roberts Co., L.P.A., James E. Roberts, Cohen & Grigsby and *Richard R. Nelson II*, for appellant.

Fleck, Mostov & Schwartz, Jeffrey B. Fleck and *Mary DeGenaro*, for appellee.

Squire, Sanders & Dempsey, David J. Young and *Kim L. Swanson*, urging reversal for *amicus curiae*, Ohio Society of Certified Public Accountants.

WRIGHT, J. This case presents two questions for review: whether this court intends to stand by our 1989 decision in *Investors REIT One* v. *Jacobs*, 46 Ohio St. 3d 176, 546 N.E. 2d 206, and whether a care provider participating in the Medicaid reimbursement program is an intended third-party beneficiary of a private auditor's contract with the ODPW to audit the provider. We answer in the affirmative to the first question and in the negative to the second. Consequently, we reverse the decision of the court of appeals.

I

Our decision in *Investors* governs Windsor's negligence and malpractice claims. Neither party disputes the applicability of *Investors* to the facts of this case; however, Windsor argues first that *Investors* is bad law and thus we should reverse it, or, in the alternative, that *Investors* alters vested substantive rights and thus we may not apply it retroactively to Windsor's cause of action. We choose not to reverse *Investors*, and further, we hold that *Investors* poses no retroactivity problem.

In *Investors*, we held that the four-year statute of limitations in R.C. 2305.09[2] applied to accountant negligence ac-

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[2] R.C. 2305.09 reads:

"An action for any of the following causes shall be brought within four years after the cause thereof accrued:

"(A) For trespassing upon real property;

"(B) For the recovery of personal property, or for taking or detaining it;

"(C) For relief on the ground of fraud;

"(D) For an injury to the rights of the plaintiff not arising on contract

tions and that Ohio has no discovery rule to delay the running of the statute of limitations in accountant negligence actions. Paragraph one of the syllabus held that:

"Claims of accountant negligence are governed by the four-year statute of limitations for general negligence claims found in R.C. 2305.09(D), not by the two-year period for bodily injury or injury to personal property set forth in R.C. 2305.10, or by the one-year limitations period for professional malpractice claims in R.C. 2305.11(A)."

Part (a) of paragraph two of the syllabus held that:

"The discovery rule is not available to claims of professional negligence brought against accountants."

R.C. Chapter 2305 dictated the result in *Investors*. That same chapter dictates the same result today.

In the alternative, Windsor argues that *Investors* alters existing legal rights by shortening the statute of limitations for accountant negligence actions and, therefore, pursuant to Section 28, Article II of the Ohio Constitution, we may not apply *Investors* retroactively to Windsor's claims. See *Adams v. Sherk* (1983), 4 Ohio St. 3d 37, 4 OBR 82, 446 N.E. 2d 165. This argument must fail. *Investors* did not create new law, it merely interpreted the law as it then stood. Consequently, *Investors* guides us to the conclusion that Windsor's negligence and malpractice claims were not brought within the statute of limitations and therefore the trial court properly entered judgment in favor of Grant on those claims.

II

We now turn to the contract claim. Only a party to a contract or an intended third-party beneficiary of a contract may

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nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

"If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered."

bring an action on a contract in Ohio. *Visintine & Co.* v. *New York, Chicago, & St. Louis RR. Co.* (1959), 169 Ohio St. 505, 9 O.O. 2d 4, 160 N.E. 2d 311. Windsor asserts that it was an intended third-party beneficiary of the contract and that the parties to the contract — the ODPW and Grant — intended for Windsor to benefit from the contract. However, this is not the case.

Grant's duty under its contract with the ODPW was intended only to benefit the ODPW. The audit of Windsor was intended solely for the ODPW's use in assessing Windsor's dealings under the state's Medicaid plan. While Windsor arguably stood to benefit from a favorable result in the audit, it just as easily could have been, and here was, harmed by a negative result. The purpose of the audit was to search for overpayments to care providers. Any potential benefit to Windsor was merely incidental to the contract and therefore insufficient to support a breach of contract cause of action. *Visintine & Co.*, *supra*, at 507, 9 O.O. 2d at 5, 160 N.E. 2d at 313. Accordingly, we hold that a care provider subject to an audit of reimbursable costs under the Medicaid program is not an intended third-party beneficiary of the audit contract between the Ohio Department of Public Welfare and the auditor. The trial court thus properly dismissed Windsor's contract claim.

III

The trial court also entered summary judgment against Windsor on count four, the fraud claim. The court of appeals reversed the trial court on this claim as well. In this appeal from the judgment of the court of appeals, Grant has failed to brief whether judgment was properly entered on the fraud claim, and thus has waived review of this question. Nevertheless, we note that R.C. 2305.09(D) specifically provides a discovery rule for actions based on fraud and, therefore, summary judgment was not properly entered against Windsor on its fraud claim. *Investors*, *supra*, at paragraph 2b of the syllabus.

Accordingly, we reverse the judgment of the court of appeals and reinstate summary judgment in favor of Grant on counts one, two, and three of Windsor's counterclaim.

Judgment reversed.

MOYER, C.J., HOLMES, H. BROWN and RESNICK, JJ., concur.

SWEENEY and DOUGLAS, JJ., dissent.

SWEENEY, J., dissenting. For the reasons stated in my concurring and dissenting opinion in *Investors REIT One* v. *Jacobs* (1989), 46 Ohio St. 3d 176, 183, 546 N.E. 2d 206, 221, I would affirm the decision of the court of appeals below.

DOUGLAS, J., concurs in the foregoing dissenting opinion.

IN THE COURT OF APPEALS OF OHIO
SEVENTH DISTRICT

STATE OF OHIO)
) SS:
MAHONING COUNTY)

Case No. 87 C.A. 187

ALEXANDER GRANT & COMPANY,
Plaintiff-Appellee,

vs.

WINDSOR HOUSE, INC.,
Defendant-Appellant.

JOURNAL ENTRY

For the reasons stated in the opinion rendered herein, the assignments of error are sustained, and it is the judgment and order of this court that the judgment of the Common Pleas Court of Mahoning County, Ohio, is reversed and cause remanded to lower court for further proceedings according to law and consistent with this court's opinion. Costs to be taxed against appellee.

/s/ EDWIN T. HOFSTETTER,
Retired Judge of the
11th Appellate District;

/s/ NORMAN J. PUTMAN,
Judge of the
5th Appellate District;

/s/ MARY CACIOPPO,
Judge of the
9th Appellate District;

SITTING BY ASSIGNMENT.

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

Case No. 87 C.A. 187

ALEXANDER GRANT & COMPANY,
Plaintiff-Appellee,

vs.

WINDSOR HOUSE, INC.,
Defendant-Appellant.

OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court Case No. 85 CV 20306 (sic)

JUDGMENT: Reversed and remanded

APPEARANCES:

For Plaintiff-Appellee:
James E. Roberts
Charles M. Draa
816 Bank One Building
Youngstown, Ohio 44503
and
Richard Nelson
2900 CNG Tower
625 Liberty Avenue
Pittsburgh, PA. 15222

For Defendant-Appellant:
Jeffrey B. Fleck
Mary DeGenaro
1100 Wick Building
Youngstown, Ohio 44503

JUDGES:
Hon. Edwin T. Hofstetter,
Retired Judge
of the 11th Appellate District;

Hon. Norman J. Putman,
Judge of the 5th Appellate District;

Hon. Mary Cacioppo,
Judge of the 9th Appellate District;

Sitting by Assignment.

DATED: October 16, 1989

HOFSTETTER, J.

On April 7, 1980, the Ohio Department of Administrative Services (ODAS), on behalf of the Ohio Department of Public Welfare (ODPW), issued an invitation to bid to independent auditors, including appellee Alexander Grant & Company (hereinafter Grant). The purpose of the invitation was for the auditing of the financial records of nursing homes participating in Ohio's medicaid reimbursement program wherein qualified providers received payments for services provided to qualifying patients. Windsor House, Inc., appellant herein, was a provider participating in the medical assistance reimbursement program.

To participate in Ohio's medicaid reimbursement program, a provider must submit to an audit by the state, or its designee, of its financial records in order to continue to receive reimbursements for qualified medicaid patients. The purpose of the audit was to make certain that payments made to the nursing home, by ODPW, were made on the basis of reasonable cost. The audits were designed to discover overpayments and to minimize state and federal government medicaid payments.

On May 14, 1980, Alexander Grant & Company was

awarded the contract by ODAS to conduct audits of providers participating in the medicaid reimbursement program. Appellant, Windsor House, Inc., operated six nursing homes which participated in the reimbursement program that were assigned to appellee Grant for auditing.

An actual on-site audit of appellant's nursing homes took place during the weeks of October 20 and 27, 1980. After completion of the audit, an exit conference was held between Grant and the appellant on November 21, 1980. At that time Grant stated that it needed more information to complete the audit.

Grant submitted a report to ODPW on November 24, 1980. That report completed its contractual obligations and it was paid pursuant to the contract. Grant's report to the ODPW stated that appellant's accounting records were not in adequate condition to support reimbursment costs for the six-month periods ending June 30, 1975 and December 31, 1975.

Nearly two years after the report to ODPW, the State of Ohio determined that Windsor House, Inc. had received Two and One Half Million Dollars ($2,500,000.00) in medicaid overpayments and demanded reimbursement.

At this point, the appellant contracted with Grant to correct its books in order to attempt to successfully appeal the determination of overpayment. Grant performed the accounting services for the appellant but has not been paid. As a result, Grant filed a complaint on November 1, 1985 for money damages, which is not at issue in this appeal. On January 30, 1986, Windsor House, Inc. filed its answer and counterclaim asserting claims for negligence, breach of contract, malpractice, and fraudulent misrepresentation, and that Grant was liable to it for the payment of the medicaid deficiency assessed against it by ODPW; and seeking compensatory and punitive damages.

Grant moved for summary judgment on the counterclaims asserting that appellant's claims were barred by the statutes (sic) of limitations and that appellant was not a third party beneficiary to the contract between Grant and the ODPW.

Grant's motion for summary judgment was sustained. That judgment, which also found there was no just reason for further delay, was appealed to this court. The appellant assigned four errors for review, as follows:

"I. The trial court erred in ruling appellant's claim for negligence was barred by the statute of limitations.

"II. The trial court erred in ruling appellant's claim for malpractice was barred by the statute of limitations.

"III. The trial court erred in ruling appellant's claim for fraud was barred by the statute of limitations.

"IV. The trial court erred in ruling appellant was not a third party beneficiary to the contract between the State of Ohio and appellee, and therefore without standing to assert a claim for breach of contract.

The appellant included a statement of two issues presented for review to which this opinion is more closely directed in response to the assignments, as follows:

"I. The trial court erred as a matter of law in ruling appellant's causes of action for negligence malpractice and fraud accrued on the date the harmful acts occurred. Therefore, these claims were not barred by the statute of limitations.

"A. A cause of action for negligence pursuant to Ohio Revised Code Section 2305.09 accrues when damages are sustained.

"B. A cause of action for professional malpractice accrues when the malpractice is discovered, and is discovered after the professional-client relationship is terminated.

"C. Ohio Revised Code Section 2309.03(D) unequivocally provides that a cause of action for fraud does not accrue until the fraud is discovered.

"II. Appellant was a third party beneficiary to the contract between appellee and the State of Ohio; it was a member of a class for whose benefit the contract was entered into."

As to the first issue, Windsor House, Inc. asserts it was error on the part of the trial court in determining that the exit interview of November 21, 1980 triggered the running of the statute of limitations in the action for malpractice, negligence and fraud. It further asserts there is a genuine issue of material fact as to just when the audit was completed.

Summary judgment is appropriately granted only if a tripartite determination is made: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion; and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. See *Harless* v. *Willis Days* (sic) *Warehousing Co.* (1978), 54 Ohio St. 2d 64, 66; *Temple* v. *Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327; Civ. R. 56(C).

Civ. R. 56 establishes summary judgment as a procedural device designed to terminate litigation and to avoid a formal trial where there is nothing to try. *Norris* v. *Ohio Std. Oil Co.* (1982), 70 Ohio St. 2d 1. To that end, the burden is on the moving party to demonstrate a lack of genuine issue as to any material fact. The opposing party must counter with affidavits or other evidentiary material provided for in Civ. R. 56(C). *Harless* v. *Willis Day, supra.* The inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. *Williams* v. *First United Church of Christ* (1974), 37 Ohio St. 2d 150.

Actions against accountants for negligence and malpractice are governed by the general tort statute of limitations contained in R.C. 2305.09, which is four years. *Richard* v. *Staehle* (1980), 70 Ohio App. 2d 93. This being the case, the issue now before this court is when the cause of action for accountant negligence accrues and the statute of limitation begins to run.

The Ohio Supreme Court decided a similar issue in the case of *King* (sic) v. *Buckeye Union*, (sic) *Ins. Co.* (1982), 1 Ohio St. 3d 79. In that case the court had to decide whether the cause of action accrued at the time the defendant committed the negligent act, or whether it accrued at the time of the accident. The Supreme Court stated:

> "This court has not decided a case precisely on point. However, in *Austin* v. *Fulton Ins. Co.* (Alas. 1968), 444 P. 2d 536, the Alaska Supreme Court considered whether a cause of action for negligent failure to provide coverage for damage due to an earthquake arose when the policy was delivered or when an earthquake cause property damage. In holding that the later date was controlling, the court stated, at page 539, that:
>
> " '* * * The statute of limitation as to torts does not usually begin to run until the tort is complete. A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff. Appellant's interest was in being protected against earthquake loss. There was no invasion, or infringement upon or impairment of such interest until there had been a loss by earthquake, because until that event occurred such protection could avail appellant nothing. His interest, which is legally protected, was in having such protection when it was needed, at the time of the loss and not before. Thus, in a case like this there must be an injury or harm to appellant as a consequence of appellees' negligence to serve as a basis for recovery of damages before the tort became actionable and before

the period of limitation commenced to run.' " *Id.* at 81.

Sladky v. *Lomax* (1988), 43 Ohio App. 3d 4 also addresses this issue.

In *Kunz*, the Supreme Court applied the *Austin* rationale and held the cause of action did not accrue and the statute of limitation did not begin to run until the accident occurred.

As alluded to earlier, the Ninth District Court of Appeals decided a case involving accountant malpractice. In that case, *Sladky* v. *Lomax* (1988), 43 Ohio App. 3d 4, the court held that "an action against an accountant for negligent tax preparation of an income tax return does not accrue until the plaintiff is notified of an IRS assessment." Although that dealt with an IRS assessment, the same rationale applies in the instant cause. Here the appellant was not notified by the State of Ohio as to its alleged medicaid obligations until 1982. Accordingly, we hold that the cause of action did not accrue until Windsor House, Inc. was notified of the medicaid overpayments to it, and there was no harm to it which would be actionable. We find support also in this holding from decisions in other jurisdictions. In these cases the statute of limitation began to run when a party became aware of the possible accountant malpractice. *Brower* v. *Davidson, Dickert, Schutter, etc.*, 686 S.W. 2d 1 (Mo. App. 1984); *Isaacson, Stolper & Co.* v. *Artisan's Savings Bank*, 330 A. 2d 130 (Del. Supr. 1974).

We hold that appellant's first three assignments of error, as presented in the first statement of the issues, are sustained.

In its fourth assignment of error, as discussed in its second issue, appellant contends the trial court erred in granting summary judgment for Grant by finding that Windsor House, Inc. was not a third party beneficiary to the contract between Grant and the ODPW and thus lacked standing to assert a claim for breach of contract. Appellant asserts it was a third party beneficiary.

A third party beneficiary is one for whom it appears that the contract was made and entered into directly or primarily

for the benefit of the third person. *Cleveland Metal Roofing & Ceiling Co.* v. *Gaspard* (1914), 89 Ohio St. 185. It is sufficient if the third person is in the contemplation of the parties. *Leyman Corp.* v. *Piggly-Wiggly Corp.* (1951), 90 Ohio App. 506. See also *Hines* v. *Amole* (1982), 4 Ohio App. 3d 263.

In *Visintine & Co.* v. *New York, Chicago & St. Louis Rd. Co.* (1959), 169 Ohio St. 505, the Ohio Supreme Court put forth an "intent to benefit" test. Under this rationale, if the ODPW had intended that a third party should benefit from the contract, then the appellant was an "intended beneficiary" who has enforceable rights under the contract. If the ODPW had no intent to benefit the appellant, then the appellant is an "incidental beneficiary" and has no enforceable rights under the contract. See also *Norfolk & Western Railroad Co.* v. *United States* (1980), 641 F. 2d 1201.

The issue now before this court is whether appellant was an "intended beneficiary," and thus a third party beneficiary. The Ohio Supreme Court has held that accountants may be liable to third parties for professional negligence when that third party is "a member of a limited class whose reliance on the accountants' representation is specifically foreseen." *Haddon Views Investment Co., et al.* v. *Coopers & Lybrand* (1982), 70 Ohio St. 2d 154, 157; see also *BancOhio Natl. Bank* v. *Schiesswohl* (1986), 33 Ohio App. 3d 329.

In the instant cause, there was a contractual agreement between ODPW and Grant for the purpose of conducting an audit of appellant. The audit was to be performed as a condition of the medicaid reimbursement program. Depending on the result of the audit, appellant would either have to reimburse ODPW or receive reimbursement for overpayments. As the purpose of the audit was to determine the need to pay or to receive money, the result would be dependent on the outcome of the audit. Under this situation, it is likely that the appellant relied on the auditing report of appellee.

Secondly, it appears that appellant was in the contemplation of both parties to the contract. Windsor House, Inc. was either going to have to pay money or receive money. Hence, appellant was directly affected by the contract between

ODPW and Grant. In addition, Grant conducted an "exit interview" with appellant which supports the reasoning that it was a third party beneficiary.

We hold, therefore, that there is sufficient conflicting evidence on the issue of whether Windsor House, Inc. is a third party beneficiary to preclude reasonable minds from coming to but one conclusion. Appellant's fourth assignment of error, as presented in its second statement of the issues, is well taken.

In conclusion, we hold there are genuine issues as to material facts. The issues involve when the statute of limitation commenced to run and whether appellant was a third party beneficiary. Neither was determinable from the evidence available to the trial court in its consideration of the motion for summary judgment pursuant to Civ. R. 56.

This cause is reversed and remanded to the trial court for proceedings consistent with this opinion.

Putman, J., concurs.
Cacioppo, J., concurs.

APPROVED:

/s/ EDWIN T. HOFSTETTER,
Retired Judge of the
11th Appellate District,
Sitting by Assignment.

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

Case No. 85 CV 2036

ALEXANDER GRANT & COMPANY,
Plaintiff,

vs.

WINDSOR HOUSE, INC.,
Defendant.

JUDGMENT ENTRY
(Filed November 19, 1987)

This matter is before the Court on Plaintiff's Motion for Summary Judgment as to Counts 1 through 5 of Defendant's Counterclaim.

After careful review of the pleadings, arguments of counsel, evidence and applicable law, the Court finds as follows:

As to Counts, 1, 3 and 4 of Defendant's Counterclaim, the causes of action pleaded are governed by the four year statute of limitations set forth at Revised Code Section 2305.09. *Richard* v. *Stahle,* (sic) 70 Ohio App. 2d 93 (1980)

Having accrued on or before November 21, 1980, the aforementioned causes of action must have been brought no later than November 21, 1984. See, Knight Affidavit, Paragraph 16.

Counts 1, 3 and 4 of Defendant's Counterclaim are therefore time barred and Plaintiff is entitled to judgment as a matter of law on the claims there set forth.

As to Count 2 of the Counterclaim, alleging breach of contract, the Court does not find Defendant to have been a party or third-party beneficiary to the contract. Defendant is

therefore without standing to assert such a claim and Plaintiff is entitled to judgment as a matter of law. 18 O. Jur. 3d, *Contracts*, Section 178, et seq.

Count 5 of the Counterclaim also fails as a matter of law, the Court finding the communication not actionable in that it was neither defamatory, nor published beyond recognized privilege.

Plaintiff's motion is sustained.

There being no just reason for delay, it is hereby ordered that judgment be entered for the Plaintiff and against the Defendant on Counts 1 through 5 of Defendant's Counterclaim.

/s/ WILLIAM G. HOUSER, Judge

MEDICAL ASSISTANCE PROGRAM
LONG-TERM CARE FACILITY
PROVIDER AGREEMENT

(Received July 24, 1980)

FACILITY NAME: Windsor House Nursing Home #5
STREET ADDRESS: 115 Illinois Ave.
VENDOR NUMBER: 0149744
CITY: Youngstown COUNTY: Mahoning
STATE AND ZIP CODE: Ohio 45505

I. PROVIDER RESPONSIBILITIES

The above named provider of long-term care services, hereafter called the Provider, agrees to enter into and abide by all the provisions of this agreement and maintain eligibility for Medical Assistance payments at all times during which this agreement is in effect. The Provider agrees:

A. To comply with all applicable state and federal laws and rules as if fully written herein unless determined invalid by court;

B. To maintain a valid license to operate if so required by law;

C. To comply with federal conditions of participation as a skilled nursing facility, intermediate care facility, or intermediate care facility for the mentally retarded, including maintaining eligibility for Medicare payments under Title XVIII of the Social Security Act, as amended, for each certified skilled bed;

D. To open its premises for inspection by the Department, the Ohio Department of Health, and any other state or local authority having authority to inspect;

E. To include any part of the facility that meets stan-

dards for certification of compliance with federal and state laws and rules for participation of the Medical Assistance program;

F. To maintain records for seven (7) years or for three (3) years after a medical or fiscal audit has been finalized and every exception resolved, whichever is less, and file reports as required by the Department;

G. To supply the Department and other appropriate state and federal personnel, or their designes, (sic) such information as may be required to disclose the extent of services the provider furnishes to patients who are or are eligible to become Medicaid recipients; and to open all records relating to the costs of such services for inspection and audit by the Department;

H. To disclose to the Department, or its designee, full and complete information concerning the name and address of each person:

1. Who, with respect to the Provider:

   a. is an officer or director;

   b. is a partner;

   c. has a direct or indirect ownership interest totaling five (5) percent or more;

   d. has an interest of five (5) percent or more in any mortgage, deed of trust, note, or other obligation secured by the Provider if that interest equals at least 5 percent of the value of the property or assets of the Provider;

2. Who, with respect to any subcontractor in which the Provider has a direct or indirect ownership or control interest of five (5) percent or more:

   a. is an officer or director;

   b. is a partner;

c. has a direct or indirect ownership interest totaling five (5) percent or more;

d. has a interest of five (5) percent or more in any mortgage, deed of trust, note, or other obligation secured by the Provider if that interest equals at least 5 percent of the value of the property or assets of the Provider;

3. Who has been convicted of a criminal offense related to his involvement in any program operated under Titles XVIII, XIX, or XX of the Social Security Act, and who has an ownership or control interest in the Provider, or is an agent or managing employee (i.e., an individual including a general manager, business manager, administrator, director, or other individual who exercises operational or managerial control or who directly or indirectly conducts the day-to-day operations;

I. To supply to the Department or the Secretary of the Department of Health and Human Services within thirty-five (35) days of the date of a specific request, full and complete information

1. The ownership of any subcontractor with which the Provider has had, during the twelve (12) months prior to the date of the request, business transactions in an aggregate amount in excess of $25,000; and

2. Any significant business transactions occurring during the five (5) year period ending on the date of such request, between the facility and any wholly-owned supplier or any subcontractor.

J. To report in its monthly request for reimbursement to the Department the information required in Department rule 5101:3-1-56(A)(9)(b).

K. To accept as payment in full the amounts paid in accordance with applicable state law and/or Depart-

ment rule and make no additional charge to the family or to any other source for any supplement for covered services.

II. OHIO DEPARTMENT OF PUBLIC WELFARE RESPONSIBILITIES

The Ohio Department of Public Welfare, referred to above and hereafter as the Department, hereby agrees to abide by all the provisions including the following:

A. To comply with all applicable state and federal laws and rules as if fully written herein;

B. To execute this provider agreement in accordance with the certification provisions set forth by the Secretary of Health and Human Services or the Ohio Department of Health.

C. To assign this provider agreement, in the case of a change of ownership, to the new owner contingent upon the new owner's compliance with provision IV B.2 of this agreement.

D. To make payments to the Provider for patients eligible for services under the Medical Assistance program as provided in applicable state laws and Department rules.

E. To provide copies of Department rules governing the Provider's participation in the Medical Assistance program and to provide one (1) copy of proposed rules or proposed rules in revised form when filed under division (D) or Section 111.15 of the Ohio Revised Code.

F. To provide an appeal in accordance with Department rules whenever the Department proposes to implement a final fiscal audit or to suspend, deny, terminate, or not renew this agreement.

III. NONDISCRIMINATION

A. The Provider shall not fail to retain as a patient any person because he is, becomes, or may, as a patient in the home, become a recipient of assistance under the Medical Assistance program. For the purposes of this section, a recipient of Medical Assistance who is a patient in a home shall be considered a patient in the home during any hospital stays totalling less than thirty-one (31) days during any twelve (12) month period.

B. The Provider shall not fail or refuse to accept a patient because he is, becomes, or may, as a patient in the home, become a recipient of assistance under the Medical Assistance program if the Provider's ratio of Medical Assistance patients to licensed beds in the home, (rounded to the nearest percentage point) is less than the statewide ratio of patient days for Medical Assistance recipients to the total number of patient days in the homes participating in the program.

C. The Provider shall comply with Title VI and Title VII of the Civil Rights Act of 1964 and shall not discriminate against any patient on the basis of race, color, age, sex, creed, national origin, or handicap.

IV. NOTIFICATION OF TERMINATION OR CHANGE OF OWNERSHIP

A. The Provider may terminate this contract by providing the Department and the residents of the home and their sponsors with a written notice at least ninety (90) days prior to such termination.

B. In the case of a change of ownership:

1. The owner of the home operating under this provider agreement must provide a written notice as provided by Department rule at least forty-five

(45) days prior to entering into any contract of sale for the home.

2. The new owner upon acceptance of assignment of this agreement shall submit an application for participation in the Medical Assistance program including a written statement of intent to abide by Department rules, the provisions of this agreement, and to any existing plan of correction submitted by the previous owner.

C. The Department may terminate, suspend, or elect to not enter into or not to renew this provider agreement upon thirty (30) days written notice to the Provider.

V. CERTIFICATION STATUS/AGREEMENT PERIOD

The following terms of this agreement are contingent upon continued certification by the Secretary of the Department of Health and Human Services or the Ohio Department of Health, the survey agency.

A. Certification Status and Number of Beds:

☐ Skilled Nursing Facility ____

☐ Skilled Nursing/Intermediate Care Facility (DUAL) ____

☑ Intermediate Care Facility 88

☐ Intermediate Care Facility for the Mentally Retarded ____

B. Agreement Period:

Duration:	12	Months
Effective Date:	7-1-80	
Expiration Date:	6-30-81	

C. Cancellation Clause:

This agreement is subject to cancellation sixty (60) days following the scheduled date of correction of facility deficiencies in accordance with Section 5111.06 of the Ohio Revised Code, unless the survey agency finds and notifies the Department that all required corrections have been made and a plan of correction submitted which is acceptable to the Ohio Department of Health. The cancellation date of this agreement is 8-29-80.

SIGNATURES OF AUTHORIZED AGENTS

AUTHORIZED AGENT	AUTHORIZED AGENT
NAME: /s/ Stanley D. Sells/ R. Jane Richardson Ohio Department of Public Welfare	NAME: Windsor House, Inc. #5 /s/ Thomas A. Calhoun Provider
TITLE: Chief	TITLE: Vice President
DATE: 7-24-80	DATE: July 16 1980

AFFIDAVIT

STATE OF OHIO
COUNTY OF MAHONING

BEFORE ME, the undersigned authority, personally appeared J. P. DALIMAN, who first being duly sworn according to law deposes and states as follows:

1. I am the Vice President of Windsor House, Inc.

2. An audit was commenced by Alexander Grant & Company, now known as Grant Thornton, pursuant to a Provider Agreement, a sample of which is hereto attached as Exhibit "1".

3. As a result of an incomplete inspection of the books and records of Windsor House, Grant Thornton notified the Ohio Department of Public Welfare, resulting in a finding of substantial dollar overpayments.

4. Upon inquiry, Grant Thornton agreed to reexamine the books and records of Windsor House, Inc., all of which was with the intent and purpose of redetermining whether the overpayments previously reported, actually existed.

5. To its Complaint, Grant Thornton attached an engagement letter and marked it Exhibit "B". That letter is incorporated herein by reference as if fully and completely rewritten. The date of that letter is November 4, 1982 and it was accepted by Windsor House on February 5, 1983.

6. When Windsor House made its informed judgment that it had been damaged, it was within a four (4) year period of the last time Accountants were working with personnel of Windsor House, and amongst other things, advising Windsor House relative to its operations, books and records.

AFFIANT FURTHER SAYETH NAUGHT.

/s/ J. P. DALIMAN

SWORN to before me and SUBSCRIBED in my presence this 9th day of April, 1987.

/s/ MARY ANN CHANCE
NOTARY PUBLIC

SEAL My Commission Expires: October 10, 1991

EXHIBIT 1

NURSING HOME PROVIDER AGREEMENT

As a condition of participation in the Title XIX (Medicaid) Program of the Social Security Act,

NAME OF FACILITY PROVIDING SERVICES: Windsor House, Inc. #5

VENDOR NUMBER: 0149744

COUNTY: Mahoning

hereinafter called the Provider, agrees to abide by all relevant federal regulations as if fully written herein. In addition, the Provider agrees with the specific requirements as follows:

(1) To keep such records as are necessary to fully disclose the extent of the services provided to individuals receiving assistance under the State Plan.

(2) To follow the procedures and criteria set forth in the Medical Assistance Handbook, DPW 3332, dated March, 1977, and as amended.

(3) To furnish the Ohio Department of Public Welfare with such information regarding any payments claimed by such provider for providing services under the State Plan as the Ohio Department of Public Welfare may from time to time request. In addition, to accept as payment in full the amount established by the Department in accord with the law. Provider may not seek additional payment for any unpaid portion of a bill from the patient.

(4) To comply with federal conditions of participation for certification as a skilled care facility and/or as an intermediate care facility, including compliance with Title VI and Title VII of the Civil Rights Act of 1964.

(5) To inform the Ohio Department of Public Welfare within thirty (30) days of any change in the following:

(a) ownership, (b) licensure, certification/registration status, and/or (c) address.

This provider agreement is non-transferable in the case of change of ownership. This facility is certified for 88 beds, as an/a:

____X Intermediate Care Facility (ONLY)
_____ Intermediate Care Facility Mental Retardation
_____ Skilled Nursing Home/Intermediate Care Facility (DUAL)
_____ Skilled Nursing Home (ONLY)

The term of this agreement shall be for a period of 12 months, effective 7-1-78 and will expire on 6-30-79.

This agreement may be terminated by the Provider, or the Ohio Department of Public Welfare, on a thirty (30) day written notice.

☒ If this box is checked, the following paragraph applies to your facility. Place your initials next to the inserted cancellation date to acknowledge your understanding and acceptance of the terms therein.

THIS AGREEMENT IS SUBJECT TO CANCELLATION SIXTY (60) DAYS FOLLOWING THE SCHEDULED DATE OF CORRECTION OF FACILITY DEFICIENCIES, UNLESS THE SURVEY AGENCY FINDS AND NOTIFIES THE SINGLE STATE AGENCY THAT ALL REQUIRED CORRECTIONS HAVE BEEN SATISFACTORILY COMPLETED, OR SUBSTANTIAL PROGRESS HAS BEEN MADE AND A PLAN OF CORRECTION SUBMITTED WHICH IS ACCEPTABLE TO THE OHIO DEPARTMENT OF HEALTH. IF THE FACILITY IS FOUND TO BE OUT OF COMPLIANCE WITH THE SAME STANDARD(S) AT THE EXPIRATION OF THE TERM OF THE AGREEMENT, A NEW PROVIDER AGREEMENT MAY NOT BE EXECUTED.

The cancellation date of this agreement is 8-1-78

PROVIDER OR AUTHORIZED AGENT: /s/ John Masternick

TITLE: President

ADDRESS OF FACILITY (Street, City, State and Zip Code):
115 Illinois Ave., Youngstown, Ohio 44505
DATE: 7/19/78

FOR STATE AGENCY
SIGNATURE OF AUTHORIZED AGENT: /s/ Stanley Sells
[Signature Illegible]
TITLE: [Illegible]
DATE: 7-28-78
(Log Page): 39

AFFIDAVIT

STATE OF OHIO
COUNTY OF MAHONING

BEFORE ME, the undersigned authority, personally appeared J. P. DALIMAN, who first being duly sworn according to law deposes and states as follows:

1. I am the Vice President of Windsor House, Inc.

2. Windsor House, Inc. and its affiliates are and have been owners and operators of nursing homes in the State of Ohio since 1966. All homes have been licensed and certified by the State of Ohio and the United States Department of Health and Human Services in order to receive payment under the Medicaid system for those patients eligible for the program.

3. As a condition of participation, the operators have entered into and signed a Provider Agreement with the State of Ohio. Thus, the operators are subject to State and Federal rules and regulations. One such regulation requires the operator to permit the Ohio Department of Public Welfare, its employees, designees, or contractors to inspect and audit the operator's books and records.

4. Windsor House, Inc. and its affiliates have relied on work-product of such auditors contracted with the State of Ohio. It was prudent business to expect a professional result of an audit. Windsor House relied on such audit and its results, and relied on the fact that a competent auditing team performed its duties in a workmanlike manner.

5. The audit performed by Plaintiff through its employees was the first audit of its type that Defendant experienced and Defendant relied upon the Plaintiff to perform such audit in a workmanlike manner and in accordance with generally accepted accounting principles which require that such an audit result in statements which purport to present a true financial position and results of operations.

6. The audit was not completed and as a result the true financial position of Windsor House, Inc. was not given to the Ohio Department of Public Welfare.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ J. P. DALIMAN

SWORN to before me and SUBSCRIBED in my presence this 9th day of April, 1987.

/s/ MARY ANN CHANCE
NOTARY PUBLIC

SEAL

My Commission Expires:
October 10, 1991

Letterhead of
ALEXANDER GRANT & COMPANY

February 9, 1984

Mr. Frank D. Rath, Chief
Bureau of Nursing Home Audits
30 East Broad Street, 33rd Floor
Columbus, Ohio 43215

Dear Mr. Rath:

As you may be aware, Alexander Grant & Company was engaged by the Ohio Department of Public Welfare (ODPW) to perform an examination of the Schedule of Reimbursable Costs of the Nursing Home Cost Report Under Title XIX as submitted by:

Windsor House #1 — Provider Number 0196461
Audit Number: AG 361-1180
Settlement Period: September 1, 1972 through
November 30, 1979;

Windsor House #2 — Provider Number 0017378
Audit Number: AG 362-1180
Settlement Period: July 1, 1972 through
June 30, 1980;

Windsor House #3 — Provider Number 0130898
Audit Number: AG 363-1180
Settlement Period: July 1, 1972 through
June 30, 1980;

Windsor House #4 — Provider Number 0034779
Audit Number: AG 364-1180
Settlement Period: July 1, 1972 through
June 30, 1980;

Windsor House #5 — Provider Number 0149744
Audit Number: AG 365-1180

Settlement Period: July 1, 1972 through
June 30, 1980;

Windsor House — Provider Number 0375955
Audit Number: AG 366-1180
Settlement Period: June 30, 1972 through
June 30, 1980;

Alexander Grant & Company forwarded to Mr. Richard E. Trufant, of ODPW, the results of our examination in compliance with our contract with ODPW in November, 1980. In each instance, the Accountants' Opinion, which was included and made part of our report to ODPW, included a paragraph as follows:

> "The Accounting Records of the Provider were not in an adequate condition to support the costs claimed for reimbursement in the Cost Reports filed for the (Periods Ending). Nor was it practicable to extend our auditing procedures in order to satisfy ourselves that such costs were allowable (necessary and reasonable for patient care)."

We further went on to state in each instance:

> "Because of the signficance of the matter discussed in the preceding paragraph, the scope of our work was not sufficient to enable us to express, and we do not express, an opinion on the accompanying Schedule of Reimbursable Costs for the (Periods Ending)."

In early 1983, Alexander Grant & Company was contacted by Mr. John Masternick, President of Windsor House, Inc., who stated that the results, which were forwarded to him through the Bureau of Nursing Home Audits, indicated that he had been determined to be "unauditable". On February 4, 1983, we met to discuss the open and unresolved items and unreconciled matters which came to our attention during the performance of the 1980 ODPW audits.

Alexander Grant & Company made the representation to ODPW that "the accounting records were not in an adequate

condition to support the costs claimed . . .". The interpretation of ODPW that the Windsor House, Inc. accounting records were unauditable is not consistent with our report.

At the request of Windsor House, Inc., Alexander Grant & Company was engaged to perform certain agreed upon procedures for the periods and facilities in question. To that end, Alexander Grant & Company has performed substantial additional audit procedures. Since our initial contact, the accounting records of the provider were organized and made more accessible to us. Accordingly, Windsor House, Inc. was able to provide us with additional evidentiary material to support the costs reported on the Schedule of Reimbursable Costs as submitted.

In order to mutually resolve the audit discrepancies, Alexander Grant & Company is prepared to meet with representatives of ODPW and Windsor House, Inc. at a mutually agreeable time and place. If we can be of any assistance in this matter, please feel free to contact Michael H. Egerer or David C. Kubiak.

Very Truly Yours,
/s/ Alexander Grant & Company

RAKnight
dlbd

OHIO REVISED CODE

§ 2305.09 Four years; certain torts.

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the grounds of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the worngful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

§ 2305.10 Bodily injury or injury to personal property.

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section, "agent orange," causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first.

§ 2305.11 Time limitations for bringing certain actions; defintions.

(A) An action for libel, slander, malicious prosecution, or false imprisonment, an action for malpractice other than an action upon a medical, dental, optometric, or chiropractic claim, or an action upon a statute for a penalty of forfeiture, shall be commenced within one year after the cause of action accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation shall be commenced within two years after the cause of action accrued.

Subsections (B)(1) through (D) omitted.

INVESTORS REIT ONE, APPELLANT, *v.* JACOBS ET AL., APPELLEES.

INVESTORS REIT TWO, APPELLANT, *v.* FORTMAN ET AL., APPELLEES.

[Cite as Investors REIT One *v.* Jacobs (1989), 46 Ohio St. 3d 176.]

Statutes of limitations—Action against an accountant for negligence governed by four-year statute of limitations found in R.C. 2305.09(D)—Discovery rule not available to claims of negligence against accountants.

O.Jur 3d Malpractice § 5.

1. Claims of accountant negligence are governed by the four-year statute of limitations for general negligence claims found in R.C. 2305.09(D), not by the two-year period for bodily injury or injury to personal property set forth in R.C. 2305.10, nor by the one-year limitations period for professional malpractice claims in R.C. 2305.11(A).

2a. The discovery rule is not available to claims of professional negligence brought against accountants.

O.Jur 3d Limitations §§ 58, 94.

2b. However, by the express terms of R.C. 2305.09(D), the four-year limitations period does not commence to run on claims presented in fraud or conversion until the complainants have discovered, or should have discovered, the claimed matters.

(No. 88-982—Submitted April 27, 1989—Decided November 8, 1989.)

APPEALS from the Court of Appeals for Franklin County, Nos. 86AP-118 and 86AP-119.

The matter now before us derives from the litigation arising out of the demise of two real-estate investment trusts, Investors REIT One '(IRO') and Investors REIT Two ("IRT").

On April 23, 1980, IRO and IRT filed separate complaints against Larry Fortman, former trustee, and others, including

attorneys and accountants, who had participated in transactions involving the trusts. The transactions at issue were allegedly marked by a scheme to defraud that involved conflicts of interest and breaches of trust and fiduciary duty on the parts of Fortman and the other named defendants.

The accountant defendants included Coopers & Lybrand, an international firm of certified public accountants with an office located in Columbus, Ohio; H. Martin Westfall, partner in charge of the Columbus office of Coopers & Lybrand; and partners Jerry D. Sullivan and David A. Gaston. Hereafter the accountant defendants will be collectively referred to as "C & L." C & L, it is alleged, served as accountants for IRO and IRT from, respectively, 1969 and 1972 through at least part of 1975. Moreover, it is alleged, C & L served as accountants for many of the trusts' related entities, including subsidiaries, limited partnerships and joint ventures.

In its complaint, IRT alleged that Fortman had acted detrimentally to the best interests of the trust, and that such actions "were committed intentionally, knowingly, willfully, and with scienter with a purpose to defraud and deceive IRT, IRT was thereby defrauded and deceived, as a result of which IRT has been damaged." IRT further alleged that the named defendants, including C & L, had "knowingly, intentionally and with scienter, and with a purpose to defraud and deceive IRT, participated, aided and abetted Fortman in defrauding IRT, as a result of which IRT has been damaged." The alleged fraud perpetrated on IRT resulted in the loss of the entire investment of $10,000,000 by the beneficiaries of IRT.

The complaint further alleged that since no "authority existed for transactions in assets of IRT reflected on the financial statements of IRT for the years 1972 through 1974, Coopers & Lybrand (including Westfall, Sullivan and Gaston) was either grossly negligent, reckless or else knowingly participated in a fraud upon IRT perpetrated by Fortman." Alleging that C & L had knowledge of the conflict-of-interest transactions engaged in by Fortman, IRT claimed that C & L "profited from such conflicts through the

receipt of fees, estimated to be in the hundreds of thousands of dollars, from IRO, IRT and the C & L Audit Entities."

The IRT complaint further alleged:

"Coopers & Lybrand intentionally prepared notes to the financial statements of IRT for the years 1972 through 1974 in a fashion designed to obscure the entities with whom IRT had dealings, the properties involved in the transactions, the profits or other monies received by C & L Audit Entities and by Fortman and his affiliates, and that such transactions violated the IRT Declaration of Trust and constituted breaches of fiduciary duty. Coopers & Lybrand (and Westfall, Sullivan, and Gaston) knew all of such facts but intentionally disguised such facts to conceal such facts from the beneficiaries of IRT, the Securities and Exchange Commission and other users of the financial information, with the purpose of the continued realization of fees by Coopers & Lybrand from the C & L Audit Entities and to conceal the falsity of prior Coopers & Lybrand certifications of IRT financial statements."

IRT summarized its allegations against C & L:

"*Such intentional omissions* constitute breaches of its assumed duties to IRT and its beneficiaries and *constitute a further act of fraud by Coopers & Lybrand.*" (Emphasis added.)

In its prayer for relief on its claims against C & L, IRT sought damages incurred for breach of contract ($10,000,000); the repayment to IRT of all fees received by C & L; and a finding that C & L is jointly and severally liable, along with the other defendants, for other damages. IRT also prayed for $10,000,000 in punitive damages from the named defendants.

IRO filed its complaint against the named defendants the same day as did IRT — April 23, 1980. With leave of court, the complaint was subsequently amended in what the court of appeals has aptly described as "excruciating length."

The complaint asserted claims against Fortman and certain other trustees and attorneys and against the C & L accountants. In substance, the complaint alleged that the named

defendants had knowingly participated in a "scheme and conspiracy to deceive and defraud IRO" and thereby deplete the trust's assets."

As to the C & L defendants, the complaint contained specific allegations:

"C & L defendants entered the scheme and conspiracy to deceive and defraud IRO in 1969. * * * Each [accountant defendant] individually participated in the scheme and conspiracy by performing acts hereinafter referred to as the acts of C & L.

"* * *

"In addition, C & L and Westfall received title to a property of IRO * * * to pay the fees purportedly owed to C & L * * *. That transfer took place in March, 1975 and subsequently C & L concealed the transaction * * *. The transaction was entered into pursuant to the scheme and conspiracy of which C & L defendants were participants * * *."

Attacking the accountants' professional efforts, IRO also claimed:

"Further, as to financial statements for 1974 and prior periods, purported to be audited by C & L, those financial statements were not audited in accordance with generally accepted auditing standards and were simply another *part of the scheme and conspiracy*. * * * Such financial statements and C & L's purported audits violated * * * [the terms of the trust]." (Emphasis added.)

IRO further alleged that C & L had breached its contract to audit the financial statements of IRO in accordance with generally accepted standards for the years 1969, 1970, 1971, 1972, 1973 and 1974, with the breach not discovered until after June 13, 1979.

Arising out of the broad allegations of conspiracy and fraud are charges that C & L had failed to comply with generally accepted auditing standards and procedures. IRO summed up its claims alleging:

"The acts of C & L defendants mentioned herein were taken *intentionally with a purpose to deceive and defraud*

IRO, and as a result thereof IRO was deceived and defrauded and has suffered the damage herein set forth." (Emphasis added.)

As damages, IRO sought "[a]gainst each defendant, jointly and severally, for fraud and deceit, judgment in the collective amount of the gross capital contributed to IRO by its beneficiaries * * * and an award of punitive and exemplary damages * * *." Against the C & L defendants IRO sought, for breach of contract, an amount equal to the collective gross capital contribution by the IRO beneficiaries, and for the alleged wrongful taking of the IRO property to cover fees, the return of the property.

The trial court granted the defendant's various motions for dismissal or for summary judgment, finding that the trusts had failed to timely commence their actions under the pertinent statutes of limitations. On appeal, IRO and IRT contended, among their various assignments of error, that the trial court erred in finding their claims of accountant malpractice, fraud, conversion and breach of trust time-barred by either R.C. 2305.09 or 2305.11.

The court of appeals affirmed the trial court's dismissal of the trusts' claims purportedly alleging accountant negligence as time-barred under the four-year limitations period set forth in R.C. 2305.09(D). However, the appeals court reversed and remanded the trial court's dismissal of the claims founded in fraud, conversion and breach of trust, finding that under the express terms of R.C. 2305.09(D), the statute's four-year limitations period did not commence to run on these latter claims until the complainants discovered or should have discovered the claimed matters.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Crabbe, Brown, Jones, Potts & Schmidt, Charles E. Brown, Steven B. Ayers, Jill T. Fleishman, Strip, Fargo, Schulman & Hoppers, A. C. Strip, John Z. Fargo and *Michael P. Vasko*, for appellants.

Vorys, Sater, Seymour and *Pease, David S. Cupps, F. James Foley* and *Charles P. Hurley*, for appellees.

Squire, Sanders & Dempsey, David J. Young, Kevin R. McDermott, Michael W. Pettit and *Kim L. Swanson*, urging affirmance for *amicus curiae*, Ohio Society of Certified Public Accountants.

JOHN V. CORRIGAN, J. The issue presented for our consideration by the appellant-trusts, IRO and IRT, queries whether the discovery rule is available to extend the governing statute of limitations on the claims of IRO and IRT against the accountant-defendants for negligence. The "discovery rule" generally provides that a cause of action accrues for purposes of the governing statute of limitations at the time when the plaintiff discovers or, in the exercise of reasonable care, should have discovered the complained of injury. See *Oliver* v. *Kaiser Community Health Found.* (1983), 5 Ohio St. 3d 111, 5 OBR 247, 449 N.E. 2d 438; *Skidmore & Hall* v. *Rottman* (1983), 5 Ohio St. 3d 210, 5 OBR 453, 450 N.E. 2d 684. We find that the discovery rule is not available to claims of professional negligence brought against accountants.

R.C. 2305.09[1] provides a general limitations period of four years for tort actions not specifically covered by other sections of the Ohio Revised Code. See *Mahalsky* v. *Salem Tool Co.*

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[1] R.C. 2305.09 provides:

"An action for any of the following causes shall be brought within four years after the cause thereof accrued:

"(A) For trespassing upon real property;

"(B) For the recovery of personal property, or for taking or detaining it;

"(C) For relief on the ground of fraud;

"(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

"*If the action is for* trespassing under ground or injury to mines, or for *the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.*" (Emphasis added.)

(C.A. 6, 1972), 461 F. 2d 581, 585. General tort claims, including those for negligence, are governed by R.C. 2305.09 (D). *Richard* v. *Staehle* (1980), 70 Ohio App. 2d 93, 24 O.O. 3d 121, 434 N.E. 2d 1379. Likewise, general claims of professional negligence which are outside the ambit of R.C. 2305.10[2] and 2305.11[3] are also governed by the four-year limitations period in R.C. 2305.09. See *id.*

Ohio courts have consistently interpreted R.C. 2305.11(A) restrictively and have refused to extend the statute to include professional malpractice claims which are neither considered specifically by the terms of the statute nor traditionally included under the common law definition of "malpractice."[4] See, *e.g.*, *Hocking Conservancy Dist.* v. *Dodson-Lindblom Assoc.* (1980), 62 Ohio St. 2d 195, 16 O.O. 3d 217, 404 N.E. 2d 164 (professional engineer); see, also, *Lombard* v. *Medical Center* (1982), 69 Ohio St. 471, 23 O.O. 3d 410, 433 N.E. 2d 162 (nurses and laboratory technicians); *Neilsen* v. *Barberton Citizens Hospital* (1982), 4 Ohio App. 3d 18, 4 OBR 39, 446 N.E. 2d 209 (nurse); *Reese* v. *K-Mart Corp.* (1981), 3 Ohio App. 3d 123, 3 OBR 140, 443 N.E. 2d 1391 (pharmacist). Accountants are neither included specifically by the terms of R.C. 2305.11 nor are they traditionally considered professionals subject to malpractice claims at common law. Thus,

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[2] R.C. 2305.10 provides, in relevant part:

"An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."

[3] R.C. 2305.11(A), as effective July 1, 1976, provided in relevant part:

"An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, including an action for malpractice against a physician, podiatrist, or a hospital, or upon a statute for a penalty of forfeiture, shall be brought within one year after the cause thereof accrued * * *." (Subsequently amended.)

[4] At common law, the common meaning and legal definition of the term "malpractice" was limited to the professional misconduct of medical professionals and attorneys. *Richardson* v. *Doe* (1964), 176 Ohio St. 370, 372, 27 O.O. 2d 345, 347, 199 N.E. 2d 878, 880 (citing *Long* v. *Bowersox* [1909], 19 Ohio Dec. 494, 498-499, 8 Ohio N.P. [N.S.], 249, 254).

R.C. 2305.11 does not govern claims brought against accountants for alleged professional misconduct.

This court has found that the two-year statute of limitations contained in R.C. 2305.10 governs claims of bodily injury resulting from the alleged negligence of health-care professionals other than those expressly included in R.C. 2305.11. See *Whitt* v. *Columbus Cooperative* (1980), 64 Ohio St. 2d 355, 18 O.O. 3d 512, 415 N.E. 2d 985; *Richardson* v. *Doe* (1964), 176 Ohio St. 370, 27 O.O. 2d 345, 199 N.E. 2d 878. We have not extended the statute to include general negligence claims. Thus, R.C. 2305.10 is not applicable to claims of negligence against accountants.

We find that claims of accountant negligence are governed by the four-year statute of limitations for general negligence claims found in R.C. 2305.09(D), not by the two-year period for bodily injury or injury to personal property set forth in R.C. 2305.10, nor by the one-year limitations period for professional malpractice claims in R.C. 2305.11(A). See *Holsman Neon & Electric Sign Co.* v. *Kohn* (1986), 34 Ohio App. 3d 53, 516 N.E. 2d 1284; *Richard* v. *Staehle*, *supra*.

This court has determined that, in some circumstances, a discovery rule is appropriate for calculating when a cause of action accrues for purposes of defining a limitations period. Within the parameters of expressly defined circumstances, the discovery rule is applicable to claims brought under R.C. 2305.09, 2305.10 and 2305.11(A). Depending on the claim and the applicable statute, the date of discovery may toll the running of the governing statute of limitations until the plaintiff discovers or, in the exercise of reasonable care, should have discovered the complained-of-injury.

Malpractice claims brought under R.C. 2305.11(A) "shall be brought within one year after the cause of action accrued." However, the statute does not expressly consider the time when such a cause of action accrues; and, consequently, the matter has been relegated to determination by the Ohio judiciary.

In *Oliver* v. *Kaiser Community Health Found.*, *supra*, this court determined that the discovery rule was applicable to

medical malpractice claims brought under R.C. 2305.11(A). See, also, *Hershberger* v. *Akron City Hospital* (1987), 34 Ohio St. 3d 1, 516 N.E. 2d 204 (explaining *Oliver, supra*, and its progeny); *Frysinger* v. *Leech* (1987), 32 Ohio St. 3d 38, 512 N.E. 2d 337 (explaining and modifying *Oliver, supra*). This court has likewise determined that the discovery rule is applicable to claims in legal malpractice brought under R.C. 2305.11(A). *Skidmore & Hall* v. *Rottman, supra*; see, also, *Zimmie* v. *Calfee, Halter & Griswold* (1989), 43 Ohio St. 3d 54, 538 N.E. 2d 398.

The General Assembly has incorporated a discovery rule into the terms of R.C. 2305.10, which provides that an action for bodily injury or injury to personal property shall be brought within two years after the cause of action arose. Effective June 12, 1980, the terms of the statute expressly included a discovery rule for claims of bodily injury caused by exposure to asbestos or to chromium. (138 Ohio Laws, Part II, 3412.) In *O'Stricker* v. *Jim Walter Corp.* (1983), 4 Ohio St. 3d 84, 4 OBR 335, 447 N.E. 2d 727, this court expanded the discovery rule incorporated into R.C. 2305.10 to include general claims of bodily injury, when the claimed injury does not manifest itself immediately. The General Assembly has further amended R.C. 2305.10 to extend the terms of its discovery rule to claims of bodily injury caused by exposure to certain specified chemicals and drugs. See R.C. 2305.10, as amended August 26, 1982 and May 31, 1984. (139 Ohio Laws, Part I, 866, 867, and 140 Ohio Laws, Part I, 1767, 1768.)

The discovery rules adopted by this court and by the General Assembly for bodily-injury claims brought under R.C. 2305.10, and the discovery rules determined in *Oliver, supra*, and *Skidmore, supra*, for medical and attorney malpractice claims arising under R.C. 2305.11(A), are not available to negligence claims brought under R.C. 2305.09(D). However, R.C. 2305.09(D) expressly includes its own limited discovery rule:

"If the action is for trespassing under ground or injury to

mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered."

While expressly providing a discovery rule for certain actions arising under R.C. 2305.09, no such rule was extended to general claims. The General Assembly's failure to include general negligence claims under the discovery rule set out in R.C. 2305.09 argues strongly that it was not the legislature's intent to apply the discovery rule to such claims. See *Kirsheman* v. *Paulin* (1951), 155 Ohio St. 137, 146, 44 O.O. 134, 139, 98 N.E. 2d 26, 31 (explaining the statutory significance of the Latin phrase, *expressio unius est exclusio alterius*). The legislature's express inclusion of a discovery rule for certain torts arising under R.C. 2305.09, including fraud and conversion, implies the exclusion of other torts arising under the statute, including negligence. See *id.*

In *Squire* v. *Guardian Trust Co.* (1947), 79 Ohio App. 371, 35 O.O. 144, 72 N.E. 2d 137, the Court of Appeals for Cuyahoga County considered the availability of a discovery rule on multiple claims against directors of a bank for money losses suffered by the bank. The trial court found the claims sounding in negligence but distinct from any claims of fraud to be time-barred by the four-year statute of limitations of G.C. 11224 (presently encoded as R.C. 2305.09). The trial court further found that the running of the statute of limitations was not tolled by the alleged concealment of the claimed negligence.

In a statement of what is still good law, the reviewing court in *Squire*, *supra*, explained:

"In some states applicable statutes of limitations are by express provision therein tolled until the discovery of the wrong. * * * [Citation omitted.] In our own state, the statute is tolled in like manner in cases of fraud and certain trespasses, (Section 11224, General Code [R.C. 2905.09].)

"If the Legislature had deemed it expedient it could have so provided, either generally as to cases of concealed torts, or in

the banking act as to wrongful acts of officers and directors. It has not done so, and the relief if it is extended should be furnished by legislative act, not by judicial legislation.

"* * *

"No exception has been provided covering mere concealment as distinguished from direct and specific allegations of fact showing fraud.

"* * *

"Facts alleged showing mere concealment are not sufficient, therefore, to toll the statute." *Id.* at 384-385, 35 O.O. at 150, 72 N.E. 2d at 146.

In the case now before us, IRO and IRT asserted in their complaints that C & L had served as accountants for IRO and IRT through at least part of 1975. The accountants prepared annual audits for the years 1969 through 1974 which were turned over to the trusts on completion. It was not until April 23, 1980, more than four years later, that complaints were filed against the defendants on behalf of the trusts.

For reasons set forth above, we find that the trusts' causes of action commenced no later than 1975. Since the discovery rule set forth in R.C. 2305.09(D) is applicable to claims founded in fraud, conversion and breach of trust by the terms of the statute, the court of appeals appropriately reversed and remanded the summary judgments granted on such claims. However, we concur with the court of appeals that the discovery rule is inapplicable to the trusts' purported claims in accountant negligence arising under R.C. 2305.09(D). The four-year statute of limitations governing such claims in accountant negligence commenced to run when the allegedly negligent act was committed or, in this case, no later than 1975.

The General Assembly has not adopted a discovery rule applicable to general negligence claims arising under R.C. 2305.09. This court will not interpret R.C. 2305.09 to include a discovery rule for professional negligence claims against accountants arising under R.C. 2305.09 absent legislative action on the matter.

Accordingly, we affirm judgment of the court of appeals,

finding that no issue had been established which would ensure the survival of the appellants' claims in accountant negligence brought more than four years after the cause of action accrued. The appellants' claims sounding in accountant negligence are time-barred by the four-year limitations period in R.C. 2305.09. However, we note that the appellants' claims in fraud, conversion and breach of trust brought against the accountants and other named defendants in this case survive, pending the trial court's determinations on the reversal and remand ordered by the court of appeals.

Judgment affirmed.

MOYER, C.J., HOLMES, STEPHENSON and RESNICK, JJ., concur.

SWEENEY and DOUGLAS, JJ., concur in part and dissent in part.

EARL E. STEPHENSON, J., of the Fourth Appellate District, sitting for WRIGHT, J.

JOHN V. CORRIGAN, J., of the Eighth Appellate District, sitting for RESNICK, J.

SWEENEY, J., concurring in part and dissenting in part. I wholeheartedly concur in the majority's first paragraph of the syllabus regarding the proper statute of limitations applicable to claims sounding in accountant malpractice or negligence. Contrary to the arguments of *amicus curiae*, The Ohio Society of Certified Public Accountants, the two-year limitations period set forth in R.C. 2305.10 is inappropriate for determining the timeliness of a malpractice or negligence claim brought against an accountant. R.C. 2305.10 contemplates an action for bodily injury not covered by a more specific statutory limitations period, or for injuring personal property. The instant action, however, is for professional malpractice or negligence of accountants. As appellants correctly submit,

the essence of their claim is the failure of the accountants to perform duties attendant to accounting services, not the accountants' physically injuring the appellants' personal property. Therefore, the limitations period set forth in R.C. 2305.09 is most appropriate for determining the timeliness of actions in accountant malpractice or negligence.

Notwithstanding the foregoing, I strongly disagree with the majority's paragraph 2a of the syllabus which precludes application of the "discovery rule" for claims of professional negligence brought against accountants. Therefore, I must dissent from the majority's refusal to place accountants on equal footing with other professionals (*i.e.*, physicians and attorneys) with regard to determining the accrual of a professional negligence or malpractice claim.

The majority apparently declines to apply a discovery rule to actions grounded in accountant negligence simply because the General Assembly did not adopt such a rule in its enactment of R.C. 2305.09(D). However, such perfunctory reasoning has been repeatedly eschewed by this court in other "discovery" cases. See, *e.g.*, *O'Stricker* v. *Jim Walter Corp.* (1983), 4 Ohio St. 3d 84, 4 OBR 335, 447 N.E. 2d 727; *Oliver* v. *Kaiser Community Health Found.* (1983), 5 Ohio St. 3d 111, 5 OBR 247, 449 N.E. 2d 438. More importantly, such reasoning ignores this court's essential role in ensuring that cases be decided both fairly and equitably. Under the majority's rationale, one could almost make the argument that the General Assembly did not intend accountants to be liable for malpractice at all, since, unlike other professions, accountant malpractice is not mentioned in R.C. Chapter 2305. In any event, legislative inaction on a particular issue does not necessarily mean that the legislature made a conscious decision against a certain point of view. See *Oliver*, *supra*.

Like attorney and physician malpractice, accountant malpractice can entail deleterious consequences that are deserving of judicial redress. The majority's refusal to apply a discovery rule in the accountant malpractice area has the effect of denying a claim of an injured party before the injured party knew any such claim existed. In my view, the majority's

application of R.C. 2305.09(D), so as to bar the claims of accountant malpractice plaintiffs who did not know or could not reasonably have known of their injuries, clearly violates the "open-courts" provision of Section 16, Article I of the Ohio Constitution. This provision states:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." See *Hardy* v. *VerMeulen* (1987), 32 Ohio St. 3d 45, 512 N.E. 2d 626.

By failing to apply a discovery rule to accountant malpractice claims, the majority has accorded a veritable "sacred cow" status whereby accountants are treated differently from all other professionals. As appellants submit on page two of their reply brief: "All that is expected of a professional, whether he be a doctor, lawyer, or accountant, is that he perform his duties honestly, completely, and competently according to the standard of care required for the particular profession. Merely because an accountant 'dates' an audit report or merely because an accountant is not considered to be a guarantor of the accuracy of an audit does not entitle the accountant to escape liability for injuries he has inflicted by his negligence on one who is unable through due diligence to promptly uncover the wrong done to him. An accountant should be allowed no more protection from his wrongdoing than is a physician or an attorney."

In my opinion, the discovery rule in this context is not only fair, but also eminently sensible. Research reveals that the view that a cause of action against an accountant for negligence accrues, and the statute of limitations commences to run, when the injured party discovers, or in the exercise of reasonable diligence should have discovered the negligent act has wide support throughout the country. The following cases have established or reiterated some form of a discovery rule to govern accountant malpractice actions in their respective jurisdictions. See *Sato* v. *Van Denburgh* (1979), 123 Ariz. 225, 599 P. 2d 181; *Moonie* v. *Lynch* (1967), 256 Cal. App. 2d 361, 64 Cal. Rptr. 55; *Brueck* v. *Krings* (1982), 230 Kan.

466, 638 P. 2d 904; *Leonhart* v. *Atkinson* (1972), 265 Md. 219, 289 A. 2d 1; *Frank Cooke, Inc.* v. *Hurwitz* (1980), 10 Mass. App. 99, 406 N.E. 2d 678; *Brower* v. *Davidson, Deckert, Schutter & Glassman, P.C.* (Mo. App. 1984), 686 S.W. 2d 1; *Chisholm* v. *Scott* (1974), 86 N.M. 707, 526 P. 2d 1300; see, also, Annotation (1969), 26 A.L.R. 3d 1438. I believe that in the interest of justice, fairness and consistency, Ohio should also adopt a discovery rule for determining the accrual date for causes of action sounding in accountant malpractice.

Accordingly, while I would affirm the court of appeals' judgment that R.C. 2305.09(D) is the proper statute of limitations governing accountant malpractice actions, I would reverse the court of appeals in part and adopt the discovery rule for claims of accountant malpractice.

DOUGLAS, J., concurs in the foregoing opinion.